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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1991

DENNIS PURTELL MARX,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a plea hearing procedure that incompletely summarizes the elements of a complex offense and the facts supporting that offense is constitutionally adequate to assure that a defendant's guilty plea is a knowing and voluntary admission that he committed the charged crime.

2. Whether a defendant is entitled to withdraw a guilty plea when the government returns forfeited property pursuant to a plea agreement but, in violation of that agreement, fails to remove encumbrances on the property and returns it late.

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The petition of Dennis Purtell Marx respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit, entered in the above-entitled proceedings on April 26, 1991.

OPINIONS BELOW

The opinion of the Court of Appeals for the Seventh Circuit is reported at 930 F.2d 1246 (7th Cir. 1991) and is

reproduced in the appendix, page 1A, *infra*.

The district court's denial of the motion to vacate sentence was not published.

JURISDICTION

The district court's order denying petitioner's motion to vacate sentence pursuant to 28 U.S.C. § 2255 was entered January 20, 1989. Jursidiction was conferred upon the court of appeals by 28 U.S.C. § 1291. The court of appeals entered judgment affirming the district court's order on April 26, 1991, and denied petitioner's petition for rehearing on July 9, 1991. By order dated September 24, 1991, entered by Justice Stevens, the time for filing a writ of certiorari was extended to December 6, 1991. The jurisdiction of the Supreme Court is invoked under 28

U.S.C. § 1254(1) and Rule 20.1 of the Rules of the Supreme Court of the United States.

STATUTES INVOLVED

21 U.S.C. § 848 provides in relevant part:

> (a) Any person who engages in a continuing criminal enterprise shall be sentenced to a term of imprisonment which may not be less than 20 years and which may be up to life imprisonment .... and to the forfeiture prescribed in section 853 of this title.
>
> ....
>
> (c) For purposes of subsection (a) of this section, a person is engaged in a continuing criminal enterprise if --
>
> (1) he violates any provision of this subchapter or subchapter II of this chapter the punishment for which is a felony, and
>
> (2) such violation is a part of a continuing series of violations of this subchapter or subchapter II of this chapter --

(A) which are undertaken by such person in concert with five or more other persons with respect to whom such person occupies a position of organizer, a supervisory position, or any other position of management, and

(B) from which such person obtains substantial income or resources.

STATEMENT OF THE CASE

Petitioner was indicted with other defendants in twenty-six counts of a forty-three count indictment filed August 7, 1985. After an all night session of plea bargaining, petitioner signed a plea agreement at 2:00 a.m. on September 7, 1986. At a hearing on September 8, 1986, petitioner entered guilty pleas to three charges: filing a false income tax return, contrary to 26 U.S.C. § 7206(1); possessing an unregistered firearm, contrary to 26 U.S.C. § 5861(d); and engaging in a Continuing Criminal Enterprise, contrary to 21 U.S.C. § 848.

The details of the plea hearing are recited at length *infra*. In general, the district court summarily questioned petitioner regarding his understanding of the 49 page plea agreement and asked petitioner whether he wished to enter a voluntary plea of guilty to three charges. The court did not explain each element that the government would need to prove to establish that petitioner engaged in a continuing criminal enterprise. In particular, the district court's abbreviated discussion of the elements of the offenses, relying in part on an incomplete recitation of the elements by the prosecutor, made no reference to the requirement that a defendant must act as a manager, organizer, or supervisor of five or more persons to be guilty of the offense.

To establish a factual basis for the

plea, the district court relied upon a fifty-five page offer of proof. Defense counsel advised the court that petitioner did not agree with the entirety of the offer of proof, and suggested that the court not explore the particulars of the offer of proof with petitioner. Defense counsel opined that petitioner's disagreements with the offer of proof would not be material. The court granted a recess to allow petitioner to review the offer of proof. When the hearing resumed, petitioner acknowledged that he had read the offer of proof. The court told petitioner that it knew petitioner had some factual disagreements with the offer of proof, and asked petitioner if he "substantially understood" the written offer to be the government's proof. Petitioner answered affirmatively. The court failed, however, to ask petitioner what he agreed with and what he thought

the government could not prove. Nor did the court determine whether petitioner, who suffers from dyslexia, formed a meaningful understanding of the fifty-five page document he reviewed during the half-hour recess.

Petitioner was sentenced on October 21, 1986 to a term of imprisonment of twenty-five years, later reduced to sixteen years.

Among other provisions, the plea agreement required the government to remove encumbrances from forfeited property, and to deliver twenty-one cows to petitioner's family upon the imposition of sentence. Alleging that the government breached the plea agreement, petitioner moved to vacate his sentence and withdraw his plea, pursuant to 28 U.S.C. § 2255. Petitioner alleged that the last cows were delivered to petitioner's fami-

ly seven months late, that the encumbrances on the cows had not been removed, and that the cows were delivered without their calves, contrary to industry standard. Petitioner's motion was also based on the failure to enter a voluntary and intelligent guilty plea.

The district court denied the motion on January 20, 1989, without granting petitioner an evidentiary hearing. Petitioner appealed the order denying the motion. A divided panel of the court of appeals affirmed the order. Petitioner seeks review of the court of appeals' decision.

REASONS FOR GRANTING THE WRIT

I. A PROCEDURE THAT INCOMPLETELY SUMMARIZES THE ELEMENTS OF A COMPLEX OFFENSE AND THE FACTS SUPPORTING THAT OFFENSE IS CONSTITUTIONALLY INADEQUATE TO ASSURE THAT A DEFENDANT'S GUILTY PLEA IS A KNOWING AND VOLUNTARY ADMISSION THAT HE COMMITTED THE CHARGED CRIME

District courts are challenged daily by the increasing complexity of federal criminal law. The new weapons Congress has added to the arsenals of the police and prosecutors in the war against crime have often made it difficult to balance the demands of innovative legislation against the constitutional requirement of fairness. Judges are learning to cope with difficult forfeiture statutes, labyrinthine sentencing guidelines, ever-changing mandatory minimum sentences and penalty enhancements, and a host of criminal statutes designed to target sophisticated crime. Among the latter are

the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1961 *et seq.*, and the Continuing Criminal Enterprise (CCE) statute, 21 U.S.C. § 848, laws that are intended to assist the prosecution and punishment of the leaders of organized crime. All these measures have been a fruitful source of litigation for the prosecution and defense bars, creating new specialties as lawyers become skilled in the nuances of each fresh piece of legislation, and creating new headaches for the judges who must sort it all out.

Difficulties are most apt to arise when judges, struggling with overcrowded dockets and multiple count / multiple defendant indictments adopt innovative procedures that provide shortcuts on the road to due process. The court in this case, faced with a forty-nine page plea

agreement and a fifty-five page offer of proof, used an abbreviated procedure to accept petitioner's guilty plea to, among other counts, a charge of engaging in a continuing criminal enterprise. The court cut corners by:

a) inviting the prosecutor to recite the elements of each offense, without explaining those elements to the petitioner;

b) accepting a recitation of the elements of CCE that omitted a crucial element of the crime;

c) asking the petitioner, who suffers from dyslexia, whether he understood the elements of the offense as stated in a written plea agreement, again without explaining the elements of the complex CCE offense to him; and

d) accepting a written offer of proof as a factual basis for petitioner's admission of guilt despite being told

that petitioner disagreed with some of the averments in the offer of proof, and without exploring those disagreements with petitioner.

By adopting this procedure, the court undoubtedly saved an hour or two of time. But the court sacrificed the constitutionally mandated assurance that defendants understand the charges to which they plead guilty, and that they intelligently determine that their conduct fits within the elements of those crimes. A majority of the court of appeals, valuing expedience over due process, found the procedure acceptable, although petitioner had moved to withdraw his plea on the ground that he did not understand a crucial element of the offense that was never explained to him, and that he was not guilty of the crime.

The constitutionality of the growing

body of similarly "innovative" procedures will become a central feature in criminal law as judges find new ways to cope with the demands made on their time. The supreme court should grant review to provide guidance to lower courts and to assure that procedures which guaranty knowing and intelligent guilty pleas are safeguarded.

A. *Intelligent Admissions of Guilt Require an Understanding of the Elements of the Crime*

Plea bargaining can have salutatory benefits for the prosecution by assuring a conviction, for the courts and society by conserving scarce judicial resources, and for a defendant by providing a measure of certainty. *Santobello v. New York*, 404 U.S. 257, 261 (1971). Yet, when a plea bargain is struck in the midst of the legal quagmire of a multiple count indictment charging complex crimes,

it is crucial that the defendant understands, not only the terms of the plea bargain and the rights that he is waiving by pleading guilty, but the nature of the offenses to which he is admitting his guilt.

This is not a new principle. The Supreme Court recognized in *Smith v. O'Grady*, 312 U.S. 329, 334 (1941), that an understanding of the charge to which a guilty plea is entered is basic to due process. More recently, in *Henderson v. Morgan*, 426 U.S. 637, 644-45 (1976), the Court made clear that a guilty plea is not voluntary, in the sense that it constitutes an intelligent admission that the defendant committed the offense, unless the defendant actually understands the elements of the offense.

In many cases, it is not difficult for a defendant to understand the elements of an offense. It is not hard to

explain to a bank robber that intentionally taking money from a bank without permission constitutes a crime. Complex crimes are more problematic. There is nothing intuitive about a RICO violation, or a CCE or conspiracy charge. The elements of complex crimes require explanations that may themselves be complex, and it is not always readily apparent, even to the experienced jurist, whether a particular course of conduct transgresses the law. It is therefore essential for courts to take special pains to assure that defendants charged with complex offenses understand the crimes to which they are pleading guilty, and that the defendants agree that their actions violated the law.

Many courts have come to understand the special care that must be taken in accepting a guilty plea to a complex

crime. Those courts have refused to give effect to guilty pleas when the trial judge did not explain the elements of the crime or determine whether the defendant understood the law in relation to the facts of his case. *See, e.g., Hayes v. Kincheloe*, 784 F.2d 1434, 1439 (9th Cir. 1986)(plea involuntary when critical element of crime was not explained to defendant); *Gaddy v. Linahan*, 780 F.2d 935, 945 (11th Cir. 1986)(due process requires that the defendant be given a description of critical elements of the offense); *United States v. Wetterlin*, 583 F.2d 346 (7th Cir. 1978), *cert. denied*, 439 U.S. 1127 (1979)(judge should not have assumed that defendant understood the elements of conspiracy); *United States v. Coronado*, 554 F.2d 166, 172 (5th Cir. 1977)("We do not think we burden our trial judges in asking that they inform a guilty pleader of some aspects of legal argot and other

legal concepts that are esoteric to an accused."); *Irizarry v. United States*, 508 F.2d 960, 965-66 (2d Cir. 1974) (complicated crimes require explanation and understanding of at least "the bare bones elements of the offense").

While these principles should not be difficult to implement -- and while they are, in fact, mandated by Rule 11 of the Federal Rules of Criminal Procedure -- they are sometimes sacrificed for the sake of expedience when adhering to them would require a substantial investment of time. As cases become more complex, time becomes an increasingly scarce commodity in federal courts. District judges may be tempted to resort to "innovative" plea procedures to accept guilty pleas without following the strict requirements of Rule 11 or -- more importantly -- without assuring that the guilty plea is made

voluntarily, with an understanding of the charges, as the Constitution requires.

The plea hearing in petitioner Marx's case presents an example of one such "innovative" but constitutionally deficient procedure. Faced with a lengthy indictment charging complex crimes and a forty-nine page plea agreement, the trial judge relied on short-cuts to establish the voluntariness of petitioner's plea. The court began its plea colloquy with petitioner by asking whether petitioner "spent some time reviewing the provisions of" his "voluminous" plea agreement. Petitioner responded affirmatively. (Tr. 9/8/86 at 9-10) After discussing petitioner's educational and employment history, the court determined that petitioner was not under the influence of drugs or alcohol. (Tr. 9/8/86 at 10) The court then asked petitioner whether he wanted to plead

guilty to count three, charging the filing of a false income tax return, to count twenty-one, charging the possession of an unregistered firearm, and to count twenty-four, charging that petitioner engaged in a continuing criminal enterprise. Petitioner answered affirmatively. (Tr. 9/8/86 at 11-12)

The court stated that, "because of the variety of counts here," it would "ask the United States Attorney to outline briefly what he understands to be the elements of these three offenses," and would then ask him to summarize the government's proof of those offenses. (Tr. 9/8/86 at 12) The prosecutor responded by stating the elements of filing a false income tax return and possessing an unregistered firearm. With regard to the CCE count, the prosecutor stated:

> The evidence would also have shown, your Honor, with

respect to count twenty-four of the indictment, that the government would have proven those elements, requisite elements of that particular violation, count twenty-four of the indictment in case number 85-CR-110, alleged a violation of the statute which prohibits a person from engaging in a continuing criminal enterprise.

The evidence would have shown that that charge was predicated on the provisions in Title 26, Title 21, excuse me, of the United States Code, Section 848.

In order for the government to prove its case with respect to that count of the indictment, your Honor, the evidence would have to show that the defendant committed at least three violations in this particular instance, of Title 21, United States Code, Section 841(a)(1). That is the unlawful possession with intent to distribute and a distribution of a controlled substance, and that he cause the use of, or used a tele-communication facility in committing or causing or facilitating the commission of a violation of Title 21, United States Code, Section 841, which prohibits the distribution or possession of, with the intent to distribute a controlled substance.

The evidence would also have show [*sic*], as set forth more fully in the indictment,

in the plea agreement, your Honor, with respect to the elements, that the government would also have proven that with respect to count 21 [*sic*] of the indictment, that the defendant, as alleged in counts five through six, counts nine through sixteen, count twenty, and count forty, that the defendant committed those violations of Title 21 of the United States Code as well, as part of this proof with respect to the charges set forth in count 21 [*sic*] of the indictment.

Your Honor, with respect to the requirement that the defendant, or that the evidence showed that the defendant in fact did distribute the alleged substances set forth in count 21 [*sic*] of the indictment, the government would have shown that the distribution occurred in the sense that the defendant delivered controlled substances to the possession of another person or that there was constructive possession of those by the persons to whom they were intended to be distributed, as set forth on page ten of the plea agreement, that these acts were done unknowingly [*sic*], as that term is defined in that provision of the plea agreement.

Your Honor, with respect to the government's offer of proof --

> COURT: Counsel, just a moment. Let me see if we can address the elements first.

(Tr. 9/8/86 at 14-16) At this point in the government's nearly incomprehensible recitation of the elements, no mention had been made of several critical elements of 21 U.S.C. § 848, including:

> the series of violations must be undertaken in concert with five or more other persons, § 848(c)(2)(A);

> the defendant must occupy "a position of organizer, a supervisory position, or any other position of management" with respect to those other persons, § 848(c)(2)(A); and

> the defendant must obtain "substantial income or resources" from the enterprise, § 848(c)(2)(B).

The court gave defendant a copy of the plea agreement, and then completed the "explanation" of the elements of CCE

as follows:

Q As to count twenty-four, commencing at the bottom of page eight and running over to the top of page nine, are you satisfied that those are the elements that you and your attorney discussed in connection with the proof that would be required of the government in this case before you could be found guilty?

A Yes, I am, your Honor.

MR. WAGNER: Your Honor, in connection with the second, just so the record is complete, the elements of count twenty-four, the CCE offense, really the first element is contained at the bottom of page eight, which is, there is at least three violations. That is then explained over paragraph nine, and paragraph ten.

MR. GLYNN: Page nine and ten.

MR. WAGNER: Page nine and ten. And on page eleven are the final three elements of the CCE offense, that is paragraphs B, C, and D, violations were continuing series of violations, they were in concert with five people and substantial resources. Just for the sake of the record.

COURT

Q Going back, then, to page nine, are you still on that page, sir?

A Yes.

Q All right. Do you understand that the three violations that are necessary can be selected from the counts five through sixteen, counts twenty and twenty-four of the indictment, by any one of those three violations?

A Yes, I am, your Honor.

Q Now, reading on there, with respect to the definitions, do you understand that those terms, such as distribute and knowingly, were defined as they are in that plea agreement?

A Yes, I am.

Q And then with respect to the further elements, as counsel has pointed out, they list additional elements, going over and through B, C, and D, on page eleven?

A Yes, I am.

Q Are you familiar with those?

A Yes, I am.

Q You feel you understand the language that is set forth on those pages?

A Yes, I am.

(Tr. 9/8/86 at 18-20)

This colloquy was woefully inadequate to establish petitioner's understanding of the elements of a CCE charge. At no point did the court explain the requirement that defendant must have been in a supervisory or managerial position[1]

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[1]Several courts have recognized the difference between engaging in a "buyer-seller" relationship or "fronting" drugs to five or five or more people and having a managerial or supervisory role in the sale of drugs. *See, e.g., United States v. English*, 925 F.2d 154, 157 (6th Cir.), *cert. denied*, 111 S.Ct. 2810 (1991); *United States v. Jenkins*, 904 F.2d 549, 553 (10th Cir.), *cert. denied*, 111 S.Ct. 395 (1990); *United States v. Jones*, 801 F.2d 304 (8th Cir. 1986). Petitioner alleges that at the time of the plea hearing, he thought that merely selling drugs to five people constituted a violation of the CCE statute. Because petitioner was denied an evidentiary hearing on his § 2255 motion, he had no opportunity to place evidence of that belief on the record, beyond the allegations of his motion.

to be guilty of engaging in a forbidden enterprise. Reliance on the recitation of the elements in the plea agreement did nothing to assure the court that the defendant understood the elements. Asking a defendant whether he understands the definitions of legal terms recited in a plea agreement is of no help in determining whether the defendant actually does understand the language in the agreement, or its application to his case.

Remarkably, the majority of the court of appeals found the plea colloquy employed by the trial court to be an acceptable procedure. The court incorrectly held that "the government came back during the district court's questioning of Marx to specifically point out to Marx and the court the remaining elements of the continuing criminal enterprise." 930 F.2d at 1251. In fact,

neither the government nor the court ever mentioned the key requirement of the CCE statute: that the defendant played an organizational, managerial or supervisory role. Petitioner denies that he played such a role, and denies that he ever understood that proof of managerial behavior would be required to prove his guilt.

The court of appeals also relied on the recitation of the elements of the offense in the written plea agreement, which petitioner (who is dyslexic) said he had read and understood. Permitting a defendant's understanding of the elements of the offense to be demonstrated from a written document, rather than a personal colloquy with the defendant, directly contradicts the same court's holding in *Wetterlin*, 583 F.2d at 350 n.7, where the court found that reliance on a plea agreement in which the defendant said he

understood the charges was insufficient. As the court stated in *Wetterlin*, *id.*, "For the defendant to merely state that he believes he understands provides no basis from which the court could conclude that he does in fact understand the charges." In its haste to affirm an inadequate procedure, the court of appeals failed to follow its own precedent.[2]

It is precisely to assure that a defendant's guilty plea is knowingly, intelligently, and voluntarily entered that Rule 11 requires a personal explanation

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[2]The court's holding below is also in conflict with its holding in *United States v. Frye*, 738 F.2d 196, 201-02 (7th Cir. 1984), where the court held that an inadequate plea colloquy, in violation of Rule 11, gave rise to the need for an evidentiary hearing to resolve "meaningful doubt" as to whether the defendant was ever informed or understood that a culpable state of mind was a necessary element of the offense.

of the offense to the defendant. Rule 11 "is designed to assist the district judge in making the constitutionally required determination that a defendant's guilty plea is truely voluntary." *McCarthy v. United States*, 394 U.S. 459, 465 (1969). As the Court instructed in *McCarthy*, in some cases "personally addressing the defendant as to his understanding of the essential elements of the charge to which he pleads guilty would seem a necessary prerequisite to a determination that he understands the meaning of the charge." *Id.* at 467 n.20.

The *McCarthy* decision addresses the requirements of Rule 11. *Id.* at 464. A technical violation of the rule which amounts to neither a miscarriage of justice nor a failure to follow the basic demands of fair procedure cannot be collaterally attacked by a § 2255 motion. *United States v. Timmreck*, 441 U.S. 780,

784 (1979). The Court in *Timmreck*, however, held open the possibililty of § 2255 relief "if a violation of Rule 11 occurred in the context of other aggravating circumstances." *Id.* at 784-85.

The aggravating circumstances that attended petitioner's guilty plea rise to the level of a failure of due process which can be remedied by a § 2255 motion. Petitioner alleges that he did not understand that only a manager could be convicted under the CCE statute. He alleges that he was not a manager. The record establishes that the management element was never explained to petitioner at the plea hearing, and that petitioner never expressly claimed to understand that essential element of the offense.

The district court's failure to explain a crucial element of a complex offense to petitioner deprived him of

Rule 11's "procedural safeguards that are designed to facilitate a more accurate determination of the voluntariness of the plea." *McCarthy*, 394 U.S. at 471-72. The Supreme Court should take this opportunity to hold that the failure to follow a basic procedure, designed to assure that guilty pleas are rendered intelligently, constitutes one of the "aggravating circumstances" discussed in *Timmreck*.

The Supreme Court recognized the constitutional importance of such procedures in *Blackledge v. Allison*, 431 U.S. 63 (1977).[3] Careful adherence to proce-

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[3]The Court declined to hold that a defendant in a § 2255 proceeding is bound by his statement during a plea hearing that his guilty plea was knowing and voluntary. Regardless of such representations, a guilty plea that can be shown to have been the product of misunderstanding, duress, or misrepresentation by others is a constitutionally inadequate basis for imprisonment. *Blackledge v. Allison*, 431 U.S. 63, 75 (1977).

dures is necessary to establish the voluntariness and intelligence of a guilty plea. *Blackledge*, 431 U.S. at 77-80. In his concurring opinion, Justice Powell further emphasized that the important policy of finality is "frustrated by failure to adhere to proper procedures at the trial court level." *Id.* at 84 (Powell, J., concurring).

McCarthy v. United States, *Henderson v. Morgan*, and *Blackledge v. Allison* combine to create a minimally acceptable standard of due process that must be followed in accepting a guilty plea. When a defendant, after the plea hearing, asserts his innocence and avers that he did not understand a crucial element of a complex offense, the failure of the record to demonstrate that defendant was aware of and understood all elements of the crime renders a guilty plea both

unreliable and constitutionally unacceptable.

While this principle is inherent in the troika of cases discussed above, it has never been explicitly stated in a Supreme Court opinion. Had it been, the court of appeals would not have approved the result of the district court's novel plea procedure. Instead of focusing on the real issue in the case, the court of appeals gleaned voluntariness from such factors as the petitioner's intelligence and the competence of his counsel. Reliance on such abstract factors is simply no substitute for determining on the record at the time of the plea that the petitioner understands the charge. Intelligent laymen cannot be presumed to understand the elements of complicated crimes when those elements are not explained to them. And, as Justice White noted, "it is too late in the day to

permit a guilty plea to be entered against a defendant solely on the consent of the defendant's agent -- his lawyer." *Henderson*, 426 U.S. at 650 (White, J., concurring).

B. ***Intelligent Admissions of Guilt Require an Understanding that the Facts Fit Within the Elements of the Crime***

Rule 11(f) of the Federal Rules of Criminal Procedure requires the district court to determine that a factual basis for the crime exists before accepting an admission of guilt. The rule is designed to protect the defendant who understands the offense but does not realize that his conduct did not violate the law. *McCarthy*, 394 U.S. at 467. Courts have generally held that the duty to establish a factual basis is not required by the due process clause "absent special circumstances." *Rodriguez v. Ricketts*, 777

F.2d 527, 528 (9th Cir. 1985)(*per curiam*) and cases cited. One such circumstance exists when a defendant enters a guilty plea while asserting his innocence pursuant to *North Carolina v. Alford*, 400 U.S. 25 (1970). In that situation, the district court cannot be certain that defendant's plea reflects actual guilt unless a factual basis is established. *Willett v. Georgia*, 608 F.2d 538, 540 (5th Cir. 1979). Similarly, when a defendant makes inconsistent statements, constituting both admissions and denials of guilt, establishing a factual basis is required by due process to assure that the defendant is actually guilty. *United States ex rel. Dunn v. Casscles*, 494 F.2d 397 (2d Cir. 1974); *Gooding v. United States*, 513 A.2d 1320, 1328 (D.C. 1986).

In petitioner's case, the district court made no meaningful inquiry into the existence of a factual basis for the

offense. Instead, the government submitted a written offer of proof, fifty-five pages in length. Petitioner's lawyer then stated:

> The offer of proof, as my client and I understand it, and as my client and I have gone through it, represents just exactly that, it is what the government believes it could have proven. As with any offer of proof, there are differences between what the government asserts it could prove, and what the defendant acknowledges it could prove.

(Tr. 9/8/86 at 21) Petitioner's lawyer stated he had no objection to filing the offer of proof, but stated he did not "believe it is necessary or, for that matter, even appropriate to go through a fifty page offer of proof with the defendant, asking how much he agrees with and how much he doesn't." (Tr. 9/8/86 at 21-22) Petitioner's counsel stated that they were "in general agreement" with the offer of proof, that they disagreed with

specific points, and that none of the disagreements were material to the elements of any of the offenses. (Tr. 9/8/86 at 22).

The court recessed to read the offer of proof, and asked defense counsel to review the offer with petitioner. When the court reconvened, it asked petitioner if he had had the opportunity to review the offer of proof.[4] Petitioner answered affirmatively. The inquiry into a factual basis for the charges then consisted of the following:

> Q All right. I realize that there may be some factual disputes that you might have, but in the overall, basic overall picture, is that something that

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[4]Petitioner actually had about one-half hour to read the fifty-five page offer of proof. As petitioner's presentence report made clear (although the court of appeals chose to disregard it), petitioner suffers from dyslexia, a condition that has a serious adverse impact on reading skills.

you substantially understood would be the government's proof?

A Yes, I do, your Honor.

COURT: All right, the Court is going to find then that based upon this offer of proof by the government, that there is a factual basis for the charges to which this defendant has indicated a desire to change his plea. And that as to those three counts, counts three, twenty-one, and twenty-four, the offer of proof is sufficient in the Court's judgment to establish the elements necessary to require a finding of guilt in this case.

(Tr. 9/8/86 at 23) Remarkably, the court failed to ask petitioner if he believed the government could actually prove the specific elements of the offenses to which he was pleading guilty. The court made no attempt to discern whether any of petitioner's disagreements with the offer of proof concerned facts which would have been essential to proof of the offenses. If the court had, for instance, inquired whether petitioner believed the govern-

ment could prove he managed or supervised five or more persons, it would have learned that petitioner did not agree that the government could prove a crucial element of the CCE charge.

Thus, the procedure adopted by the trial court failed miserably to assure that petitioner's guilty plea constituted a knowing admission to a crime that he actually committed. On the one hand, because petitioner "did not receive adequate notice of the offense to which he pleaded guilty, his plea was involuntary and the judgment of conviction was entered without due process of law." *Henderson v. Morgan*, 426 U.S. 637, 647 (1976). On the other hand, the court knew that petitioner disagreed with parts of the government's offer of proof, but failed to ask him whether he believed the government could prove each element of

the offenses to which he was pleading guilty. Thus, the court failed to determine that petitioner understood the elements of the crime he was admitting, and failed to determine whether the conduct he admitted actually fit within those elements. It is under similar circumstances that the lower court decisions cited above have held a factual basis determination to be constitutionally mandated.

The "factual basis" determination, in these circumstances, is directly related to the constitutional requirement that a defendant knowingly and intelligently admit his guilt before losing his liberty. Because "a guilty plea is an admission of all the elements of a formal criminal charge, it cannot be truly voluntary unless the defendant possesses an understanding of the law in relation to the facts." *McCarthy*, 394 U.S. at 466.

Defendant was in no position to tell the court that his disagreement about the government's ability to prove his "managerial" role was material, because the court never told petitioner that such proof constituted an essential element of the offense. Surely, under these circumstances, establishing that petitioner agreed with the factual basis for the offense was necessary to afford petitioner due process of law.

The abbreviated procedure adopted by the trial court wholly failed to protect the petitioner's right to due process. As importantly, it failed to assure society that criminal convictions are entered in the absence of a trial only when the defendant admits his guilt with an intelligent understanding of the elements of the offense, or when the court -- faced with a record that does not clearly

demonstrate the defendant's understanding of those elements -- makes a record to establish that the defendant agrees that the government has evidence to prove each essential element of the crime.

Other courts will no doubt be tempted to employ similar procedures, as demands on judicial time increase and as crimes grow more complex. One can feel sympathy for a district court judge facing a file that begins with an indictment charging dozens of crimes against several defendants, is fattened by scores of motions, and concludes with a forty-seven page plea agreement and a fifty-five page offer of proof. The temptation to cut corners must be great. Only the Supreme Court can decisively advise district courts that the United States Constitution does not permit corners to be cut when an accused's fundamental right to liberty is at stake. Our judicial

system depends for its validity upon strict adherence to careful procedures. If courts are allowed to adopt innovative procedures that undercut guarantees of trustworthiness and that produce unreliable results, our system of criminal justice will lose its integrity -- and ultimately, its popular support.

The time is ripe to examine "innovative" procedures for accepting guilty pleas, and to reaffirm the constitutional necessity for procedures that assure reliability in the taking of guilty pleas.

II. A DEFENDANT IS ENTITLED TO WITHDRAW A GUILTY PLEA WHEN THE GOVERNMENT RETURNS FORFEITED PROPERTY PURSUANT TO A PLEA AGREEMENT BUT, IN VIOLATION OF THE AGREEMENT, FAILS TO REMOVE ENCUMBRANCES ON THE PROPERTY AND RETURNS IT LATE

As laws defining criminal behavior grow more complex, so do the remedies available to the government. Forfeiture

statutes have become a widely used and hotly debated tool for prosecutors. Forfeitures are often the most carefully negotiated provisions in plea agreements. The importance of such provisions to both the prosecution and the defense guarantees that the construction of forfeiture language in plea agreements will breed substantial litigation in the next several years. The Supreme Court can guide that litigation by laying much needed foundation for the enforcement of plea bargains that dispose of forfeited property.

The importance of fair plea bargaining was recognized in *Santobello v. New York*, 404 U.S. 257 (1971). The *Santobello* decision likened a plea bargain to a contract, and held that breach of a material provision of a plea bargain entitles a defendant to repudiate the

contract -- i.e., to withdraw the plea made in reliance on the agreement. *Santobello*, 404 U.S. at 264.

The government's adherence to a plea agreement is particularly important when the agreement governs disposition of assets subject to forfeiture. When the government threatens to forfeit all assets that may keep a defendant's family from starvation, it places the defendant in an unfavorable bargaining position. It is often the case that a defendant (such as petitioner Marx) who faces a lengthy prison sentence may wish to trade his right to a trial for the assurance that his family will not live as paupers. If the government chooses to induce pleas by weilding the club of forfeiture, the government must be held to the strict terms of the agreement it negotiates. Developing the policy of fairness that underlies the *Santobello* decision, the

Supreme Court should make clear that the government is strictly bound by the terms of an agreement that offers relaxed enforcement of forfeiture statutes as an inducement to plead guilty.

The United States Court of Appeals for the Seventh Circuit recognized the necessity of strict adherence to plea bargains in *United States v. Fields*, 766 F.2d 1161, 1168 (7th Cir. 1985), but disregarded the *Fields* decision, as well as *Santobello*, in deciding petitioner's appeal. While the government breached its plea agreement with petitioner in three significant ways, the court of appeals remedied none of the breaches.

First, the government failed to return twenty-one head of cattle to petitioner's family "upon the imposition of sentence," as the plea agreement required. (Plea agreement 23) The

government does not dispute that the last of the cattle were not returned to petitioner's family until May 1987, shortly after petitioner filed his Motion to Vacate Sentence. Petitioner was sentenced October 21, 1986.

The district court found no violation of the plea agreement, despite the seven month delay in returning the cattle. It construed the plea agreement to require only that the cattle be returned at some unspecified point "after sentencing." (Order Denying Motion to Vacate 5) That conclusion was contrary to the plain language of the plea agreement, which required the government to act "upon the imposition of sentence." The court of appeals rejected the district court's reasoning when it properly held that the return of the cattle was required "at or shortly after sentencing." 930 F.2d at 1248.

Despite the clear promise of speedy delivery that the government agreed to fulfill in exchange for a guilty plea, the court of appeals held that it was not reasonable for petitioner to expect the cattle to be returned at the time of sentencing. The court essentially held that performance was impossible because the government was required by 21 U.S.C. § 853 to resolve "conflicting claims" made by "lienholders" with respect to the cattle prior to delivering the cattle to petitioner's family. 930 F.2d at 1249. The court's conclusion, however, is contrary to the facts in the record and to the Supreme Court's interpretation of forfeiture laws.

The facts demonstrate that the government had no excuse to delay the return of the cattle. Some of the cattle were returned to petitioner's family

shortly after sentencing. Yet M&I Bank claimed an interest in those cattle by virtue of a security agreement, and its claim was not resolved until April 30, 1987, many months after those cattle were returned to petitioner's family. The government returned the remaining cattle to petitioner's family after the Motion to Vacate Sentence was filed. The record fails to support the fiction that the government's delay was attributable to any efforts to resolve "conflicting claims." The court of appeals' holding, while inventing a convenient excuse for the government's conduct (an excuse the government itself did not advance in its

appellate brief),[5] is factually incorrect.

Of greater importance, from the standpoint of the precedential impact of the court of appeals' opinion, is the court's incorrect analysis of the law. The government had no duty to resolve "conflicting" claims before returning the cattle. In *Caplin & Drysdale v. United States*, 491 U.S. 617, 627 (1989), the Supreme Court held that title to property which is subject to forfeiture vests in the United States at the time of the criminal act giving rise to application of the forfeiture laws. Forfeiture orders subsequently imposed by courts

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[5] The government's brief before the court of appeals argued only that the phrase "upon imposition of sentence" set no deadline by which it was required to return the cattle, and that petitioner's expectations of a prompt return were therefore unreasonable. The court of appeals properly rejected that construction of the agreement. 930 F.2d at 1248.

merely recognize the transfer of title that occurred at the time of the unlawful act. *Id.*

There was no dispute in this case that the cattle became the property of the government, by virtue of forfeiture laws, well before any other "lienholder" acquired an interest in the cattle. Thus, no valid liens ever came into existence. The exclusive procedure for resolving claims to forfeited property under these circumstances is provided by 21 U.S.C. § 853(n). *United States v. Monsanto*, 491 U.S. 600, 604 n.3 (1989). If there were "conflicting claims" for the government to resolve, those claims were subject to the procedural steps required by § 853(n). Such claims do not affect the validity of the government's title to the forfeited property, and therefore did not prevent the government

from returning the cattle as it had promised. Whether the government had an obligation to pay such claims wasan issue that had no bearing on the government's promise to return the cattle to petitioner's family.

The plea agreement certainly does not say that the government could sell the cattle to pay "conflicting" claims (nor did the government attempt to do so). Rather, the plea agreement specified other property that would be sold to pay claims established by the § 853(n) procedure. The court of appeals failed to explain why the statutory method of resolving claims to forfeited property would justify the government's delay in returning the cattle. No such explanation exists. Thus, it was legally incorrect to hold that the government's delay in returning forfeited assets pursuant to a plea agreement was attributable to any

need to resolve the claims of other parties.

The delay was a material breach of the plea agreement. The government's timely adherence to the plea agreement was of particular importance to petitioner. The cattle had been raised by petitioner's daughter. The delay in returning the cattle caused his family a substantial financial loss, because the cattle were "foundation" cows used for an embryo transplant program. Petitioner was deprived of much of the benefit of his bargain because of the delay. He is therefore entitled to withdraw his guilty plea.

Second, the plea agreement required the government to deliver the cattle free from encumbrances. The district court and the court of appeals, however, read that language out of existence with re-

gard to the cattle that were delivered to petitioner's family. Paragraph VIII of the plea agreement provided for the disposition of forfeited and non-forfeited assets, including assets associated with a business (Accurate Brass and Aluminum Foundry, Inc.) and assets associated with Maple Tree Farms. With regard to the farm, the plea agreement provided that proceeds from the sale of assets would first be used to pay the expenses of seizing, maintaining, and selling the assets. The proceeds would then be used as follows:

> (b) Second, after proceedings are held in accordance with the provisions of 21 U.S.C. § 853(n), payment of any and all bona fide liabilities and/or obligations of Maple Tree Farms together with any other encumbrance(s), unless, pursuant to the terms of any sale or purchase agreement, such liability, obligation, and/or encumbrance is assumed by the purchaser of such property or asset.

The next paragraph of the agreement stated that "upon the imposition of sentence" and after receiving a waiver of all claims to the foundry and farm from petitioner's daughter (and other designated individuals), the government was obliged to deliver twenty-one head of cattle to petitioner's family. The court of appeals held that, because this paragraph made no reference to the preceding paragraph requiring payment of encumbrances,[6] the government was not required to remove the encumbrances on the cattle

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[6]The government failed to engage in such a detailed reading of the plea agreement when it briefed the case before the court of appeals. Instead, it primarily argued that the cattle were never forfeited, and that the government therefore had no obligations with regard to the cattle. Of course, if the cattle were never forfeited, the excuse invented by the court of appeals to justify the delay in returning the cattle would be unavailing. In any event, as the court of appeals correctly held, the cattle were forfeited by virtue of section VII of the plea agreement. 930 F.2d at 1248.

before delivering them to petitioner.

As the dissent below admonished, the majority's reasoning was internally contradictory. On the one hand, the majority held that the government was required to resolve the conflicting claims of lienholders before delivering the cattle to petitioner's family. On the other hand, the majority held that the government had no obligation to satisfy those encumbrances before delivering the cattle. One way or the other -- by waiting seven months to deliver the cattle, or by failing to satisfy the encumbrances before delivering the cattle -- the government breached the plea agreement. 930 F.2d at 1257 (Cudahy, J., dissenting). The court of appeals' decision that the government did nothing wrong is logically inconsistent. Worse, it is a decision that cheats petitioner out of his remedy for the government's wrongful

conduct.

The court of appeals' analysis of the plea agreement contradicted its previous holdings that ambiguous language in a plea agreement should be construed to give effect to a defendant's reasonable expectations. *United States v. Fields*, 766 F.2d 1161, 1167-68 (7th Cir. 1985). Instead, the court of appeals construed a lengthy agreement in a hypertechnical manner that is contrary to the agreement's spirit.[7] The court held that paragraph VIII(A) of the agreement -- requiring the government to pay the obligations of Maple Tree Farms "together with any other encumbrance" -- applied only to assets to be "disposed of by

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[7] The court's analysis also employs the "rigidly literal ... construction of language" that the same court held to be inappropriate to plea agreements in *United States v. Bowler*, 585 F.2d 851, 854 (7th Cir. 1978).

sale." 930 F.2d at 1249. The court then held that paragraph VIII(B) -- requiring distribution of the cattle to petitioner's family -- was not subject to the requirement of paragraph VIII(A) that encumbrances on forfeited property be satisfied. Yet there is nothing in paragraph VIII(A) that limits the government's obligation to satisfy encumbrances to property that it chooses to sell.

The court's construction of the plea agreement gave petitioner a useless bargain. His obvious goal was to shelter one small part of his property for his family's benefit, in exchange for surrendering the rest of the forfeited property -- as well as his freedom -- to the government. By holding that the government did not need to satisfy the encumbrances on the transferred property with the proceeds of the property it sold, the

court of appeals foiled the petitioner's desire to save his family from financial ruin, and deprived petitioner of the primary benefit he intended to receive by pleading guilty. The Supreme Court should reject such an unfair reading of a plea bargain when the reading is plainly contrary to the defendant's reasonable expections.

Third, petitioner alleged that industry practice is to deliver embryo transplant calves with their parent cows. Petitioner alleged that the government failed to return the embryo transplant calves, thus depriving his daughter of substantial value that he "purchased" with his plea bargain. Obviously, the only way to establish industry practice in such transactions -- and thus, the only way to undertake a meaningful interpretation of the contract -- would be to take evidence on petitioner's claim.

Yet the district court denied an evidentiary hearing and, like the court of appeals, simply ignored petitioner's claim. This hardly constitutes the application of contract principles to breached plea agreements as contemplated by *Santobello*. The loss of the embryo transplant calves, valued at $10,000.00 each, further lessed the benefit petitioner (through his family) should have obtained from the plea agreement.

In short, innocent parties got hurt because the government failed to follow the demands of the plea agreement. That fact seems to have been lost on the district court and on the court of appeals, but it is the salient fact that should motivate the Supreme Court to review this issue. Future plea agreements, designed to induce guilty pleas by offering a defendant the promise that his

family will be protected from financial disaster, are likely to be subject to the same kind of unfair dealing by the government that was accepted by the court of appeals here.[8] The Supreme Court should review this case to make clear that the government, when using its most terrifying weapons to induce plea agreements, must honor and respect those agreements. When the government breaches such an agreement at the expense of an innocent party, confidence in the integrity of the government is undermined. When courts engage in strained readings of plea agreements to approve such behavior, confidence in the integrity of the judiciary is eroded, as well. Only the

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[8] The government has a clear financial interest in breaching agreements regarding forfeiture provisions if -- as here -- it can save money by doing so, and if it knows the defendant will not be allowed to withdraw his guilty plea as a consequence of the breach.

Supreme Court can halt the erosion by sending a message to all lower courts that a plea agreement involving forfeited property must be strictly honored. If it is not, the defendant should be allowed to withdraw his plea.

CONCLUSION

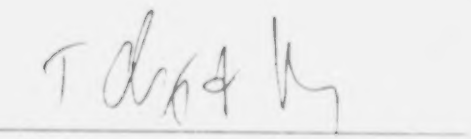
The issues in this case present two sides of the same coin. They each reflect the struggle between traditional concerns of fairness and a more modern desire to fight crime with sophisticated weaponry. Neither the government's desire to maximize its profits via forfeiture statutes, nor a court's desire to bring a quick end to a guilty plea hearing, are sufficient reasons to disregard time-honored notions of fairness and due process.

As innovative plea procedures and the negotiation of forfeiture provisions in plea agreements become increasingly common, the problems that arose in this case will become commonplace. The Supreme Court can provide essential guidance to the lower courts that are struggling with these issues. The

Supreme Court should seize the opportunity to improve the interpretation of complex plea agreements and to sharpen the procedures for taking guilty pleas to complex offenses by granting certiorari in this case.

Dated: December 2, 1991.

Respectfully submitted,



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TEXT OF OPINION

Dennis Purtell MARX v. UNITED STATES of America

Reported at: 930 F.2d 1246 (7th Cir. 1990)

[formal parts omitted]

Before CUDAHY, EASTERBROOK, and KANNE, Circuit Judges.

KANNE, Circuit Judge.

The U.S. Marshal was late in delivering two cows - and therefore Dennis Purtell Marx claims that his guilty plea to drug distribution, firearms and tax charges should be thrown out. This claimed late delivery of the cows to his daughters - cows encumbered by bank liens - was, Marx asserts, a breach of his plea agreement. Marx also says that, in any event, he really didn't understand what he was pleading guilty to and therefore his plea was constitutionally infirm.

For a number of years Dennis Purtell Marx operated a wide-spread and profit-

able illegal drug distribution operation from two of his Wisconsin businesses, Accurate Brass and Aluminum Foundry, Inc. and Maple Tree Farms. Both the foundry and the farm served to hide money from drug sales. As to Maple Tree Farms, cattle were purchased and improvements were made to the farming operation from drug sale proceeds. The farm was also used by Marx for other activities such as the beating administered to a drug debtor to encourage him to pay his bills. All this came to an end, however, on August 7, 1985, when Marx was charged in an indictment with twenty-six counts of criminal offenses related to his drug distribution operation.

Thirteen months after the indictment was returned, Marx entered into an extensive and detailed plea agreement with the government. The basic plea agreement document consisted of forty-nine pages to

which were added seven pages of addenda. In return for Marx's agreement to plead guilty to three of the counts in the indictment and to cooperate in ongoing investigations, the government agreed to dismiss the remaining twenty-three counts, recommend a sentence of fifteen years, and raise no opposition to Marx's continued release on bail pending sentencing. The plea agreement also provided in detail for the forfeiture, sale and disposition of Marx's business and farm assets - including delivery of twenty-one head of forfeited cattle to Marx's daughters.

On September 8, 1986, pursuant to the plea agreement, Marx pleaded guilty to (1) operating a continuing criminal enterprise involving drug distribution, (2) possessing an unregistered AR-15 automatic rifle, and (3) filing a false

federal income tax return for the year of 1983. Marx was sentenced on October 21, 1986, to twenty-five years imprisonment (later reduced by the district court to sixteen years imprisonment). No direct appeal was taken.

Thereafter, Marx filed a request for habeas corpus relief in which he sought to vacate his sentence and withdraw his guilty plea. The district court found no merit in Marx's habeas corpus claims and refused to vacate his guilty plea. We affirm the denial of relief.

I.

According to Marx, the seven-month delay in placing two forfeited cows in the possession of his daughters was a government breach of the cattle-delivery requirement of the plea agreement and thus constitutes a sufficient basis to vacate his guilty plea. Marx also as-

serts that the government breached the plea agreement by not delivering the twenty-one head of forfeited cattle to his daughters free of encumbrances.

To resolve these contractual claims we must interpret several relevant provisions of the plea agreement and apply these provisions to facts which are not in dispute.[1] As we held in *United States v. Mooney*, 654 F.2d 482, 486 (7th Cir. 1981), "[a] plea bargain is a contract, terms of which necessarily must be interpreted in light of the parties' reasonable expectations. The resolution of each case depends upon the essence of the particular agreement and the Government's conduct relating to its obligations in that case." *See also United States v. Fields*, 766 F.2d 1161, 1168 (7th Cir.

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[1] Appended to this opinion are the pertinent provisions of the plea agreement relating to forfeited assets.

1985); *Brooks v. United States*, 708 F.2d 1280, 1281 (7th Cir. 1983).

Our focus is on those sections of the plea agreement which concern the forfeiture and disposition of the assets of Maple Tree Farms - in particular a herd of cattle. We begin our examination with paragraph B of Section VIII of the plea agreement which provides that twenty-one specified head of forfeited cattle (and two donkeys not at issue here) be delivered to Marx's daughter by the United States Marshal "upon the imposition of sentence." Absent any qualifying or limiting provisions, this would require delivery of the cattle at or shortly after sentencing.

We know that delivery of nineteen of the twenty-one head of forfeited cattle was accomplished shortly after sentencing. Marx was sentenced on October

21, 1986. Nineteen cattle were repossessed from Marx's daughters' possession by a lienholder bank in late January of 1987. Thus, at least nineteen of the twenty-one head of cattle were delivered within three months of sentencing - and in fact there is nothing in the record to show that those nineteen were not delivered even earlier. In any event, In any event, Marx previously defined his claim by stating that "the government did not abide by the terms of the plea agreement, that is[,] [ ] the government did not return these two cattle upon sentencing."[2] Thus, it is the delivery of the last two cows seven months after

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[2] "Traverse to Government Response," filed in the district court on June 30, 1987. Marx also notes in his "Memorandum in Support of Motion to Vacate Judgement Pursuant to Title 28 U.S.C., sec. 2255," filed in the district court on May 18, 1987, that the government was in breach of the plea agreement because of the late delivery of two cows.

sentencing that Marx asserts was contrary to his reasonable expectations.

To resolve whether Marx's expectations were reasonable we must examine the entire plea agreement to determine if other terms or conditions qualify or limit the provision in paragraph B of Section VIII for delivery of the cattle "upon sentencing."

A significant factor which impacted on any expectation of delivery was the requirement that all the cattle be forfeited to the United States. Section VII of the plea agreement provides that after Marx's plea of guilty is accepted, the court, shall enter a forfeiture order "to provide that all right, title, and interest is vested in the United States of America with regard to all of the property and assets described in ... Attachment C of this Plea Agreement...." Attachment

C lists as one of the classes of forfeited assets, "any and all livestock including, but not limited to all black angus bulls, cows and calves titled to or otherwise owned by Dennis P. Marx and/or Maple Tree Farms...." There is no provision anywhere in the plea agreement exempting the cattle or any other assets listed in Attachment C from forfeiture.[3]

Both the government and Marx acknowledge in the plea agreement that the United States has the obligation to protect third-party interests and claims with respect to the forfeited assets. Title 21 U.S.C. § 853 is specifically

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[3]The headings of both Sections VII and VIII of the plea agreement refer to "non-forfeited" property and assets. However, only those "properties and assets [that] are necessary sources of funds needed ... to satisfy" taxes, penalties and interest assessed by the Internal Revenue Service up to $297,000 are "non-forfeited." No property listed in Attachment C is specifically designated as "non-forfeited."

referred to in Paragraph A of Section VII of the plea agreement, and that statute provides a mechanism for the protection of third-party interests in forfeited property. The statute states that when disposing of forfeited property, provision must be made "for the rights of any innocent persons," thus requiring the government to protect third parties by taking into account any conflicting claims. 21 U.S.C. § 853(h). Delivery of forfeited property to third parties could not, under the terms of the statute incorporated into the plea agreement, be carried out in a way which would jeopardize lienholders.

In this case, there were conflicting claims filed with respect to the cattle. The government noted in its "Response in Opposition to Defendant's Motion Pursuant to 28 U.S.C. § 2255," filed in the district court on June 17, 1987, that it

delayed delivery of the two cows pending resolution of claims filed under § 853(n). Conflicting claims were made by lienholders with respect to the cattle the government agreed to deliver to Marx's daughters. After the conflicting claims were resolved, the last two cows were delivered. The delay in delivery was a necessary consequence of the statutory duty owed by the government to third parties, and the performance of that duty was contemplated by Marx and the government according to the terms of the plea agreement.

The government's statutory duty with regard to the forfeited property, acknowledged in the plea agreement, had the effect of qualifying and limiting the timing of delivery of any encumbered cattle. Viewed objectively, the delivery of the last two cows only after conflicting

lienholders' claims had been resolved could not be contrary to any reasonable expectations based on the plea agreement. *See United States v. Strawser*, 739 F.2d 1226, 1230 (7th Cir.), *cert. denied*, 469 U.S. 1038, 105 S.Ct. 518, 83 L.Ed.2d 407 (1984)(disputes regarding terms of plea agreement are determined by objective standard). The delay in delivery of the two cows was consistent with the parallel obligations placed on the government and recognized in the plea agreement - the obligation to deliver the forfeited cattle "upon sentencing" and the obligation to protect the rights of "innocent persons." The government delivered nineteen of the twenty-one head of cattle "upon sentencing." The government's seven-month delay in delivering two cows, which came only after resolution of disputed claims by lienholders, did not constitute a breach of the plea agreement.

We next examine Marx's allegation that the government breached the plea agreement by not delivering the cattle free of encumbrances. Marx claims that because the plea agreement had a clause requiring the payment of all liabilities, obligations, and other encumbrances of Maple Tree Farms with proceeds from the sale of forfeited Maple Tree Farms assets, the government was required to pay the encumbrances on the cattle delivered to his daughters.

By the terms of the plea agreement, the government agreed to the specified disposition of all forfeited assets. Again, we focus on the farm holdings. Paragraphs A and B of Section VIII set out separate treatment for the government's disposition of two different groups of Maple Tree Farms forfeited assets; those to be sold and those to be

distributed in kind.

Paragraph A of Section VIII deals with those assets that are to be disposed of by sale. Paragraph A details how the proceeds of sales are to be used to satisfy various obligations, including this provision:

> after proceedings held in accordance with the provisions in 21 U.S.C. § 853(n), [the proceeds will be used for] payment of any and all bona fide liabilities and/or obligations of Maple Tree Farms together with any other encumberance(s) [sic], unless, pursuant to the terms of any sale or purchase agreement, such liability, obligation, and/or encumberance [sic] is assumed by the purchaser of such property or asset.

The discussion of sale or purchase agreements in this context gives the clear implication that the proceeds will be used to satisfy encumbrances only on assets disposed of by sale. The interpretation of Paragraph B also supports this conclusion.

Paragraph B of Section VIII directed

the disposition of the twenty-one head of cattle to Marx's daughters. Rather than being sold, these forfeited assets were to be distributed in kind by the government to the daughters. Paragraph B contains no provision for the satisfaction of encumbrances on the cattle.

The structure and language of these provisions leads to the following conclusion. Paragraph A of Section VIII details the "disposition by sale" of certain forfeited assets and the use of the sale proceeds to satisfy encumbrances *on those assets sold*. paragraph B, on the other hand, deals with the "non-sale disposition" of other forfeited assets - the twenty-one head of cattle - with no corresponding provision for the satisfaction of encumbrances on those assets. The result is that the government had no duty to satisfy the encumbrances on the cattle before distributing them to Marx's daugh-

ters and its failure to do so did not result in a breach of the plea agreement. Again, based on a rational interpretation of the foregoing sections, Marx's expectations that the liens on the twenty-one head of forfeited cattle would be satisfied was objectively unreasonable. *Strawser*, 739 F.2d at 1230.

The district court was not clearly erroneous in determining that the government had complied with the terms of the plea agreement - both as to the delivery of cows and the encumbrances on those cows. *See id.* at 1229-30 (stating standard of review).

II.

Marx's other argument is that his plea of guilty was constitutionally infirm. This argument centers on the following contentions. Marx claims he did not understand that a conviction under

the continuing criminal enterprise statute required supervising, managing, or organizing five or more persons. He also claims he did not understand that the filing of a false income tax return had to be willful, and that the possession of an unregistered firearm had to be knowing.

We start, of course, with the very necessary proposition that guilty pleas are generally accorded finality. *See Blackledge v. Alison*, 431 U.S. 63, 71-72, 97 S.Ct. 1621, 1627-28 (1977). It is therefore no surprise that the defendant bears the burden of persuasion as to a plea's voluntariness after the plea has been entered. *United States v. Wildes*, 910 F.2d 1484, 1486 (7th Cir. 1990). Of course, a guilty plea is valid only if it is made voluntarily, knowingly, and intelligently. *Henderson v. Morgan*, 426

U.S. 637, 96 S.Ct. 2253 (1976); *Boykin V. Alabama*, 395 U.S. 238, 89 S.Ct. 1709 (1969). Generally, a guilty plea must have a basis in fact and the defendant must admit to that basis in fact. *United States v. Frye*, 738 F.2d 196, 199 (7th Cir. 1984). But, the defendant must also possess an understanding of "the law in relation to the facts." *McCarthy v. United States*, 394 U.S. 459, 466, 89 S.Ct. 1166, 1171 (1969). A valid guilty plea should represent "a voluntary and intelligent choice among the alternative courses of action open to the defendant." *North Carolina v. Alford*, 400 U.S. 25, 31, 91 S.Ct. 160, 164 (1970), *quoted in Frye*, 738 F.2d at 199.

This is not a direct appeal, so the application of Federal Rule of Criminal Procedure 11 is not the issue in determining the validity of the plea in this case. Marx brings his action under 28

U.S.c. § 2255, where relief is available only if any legal error in taking the plea is "jurisdictional, constitutional, or is a fundamental defect which inherently results in a complete miscarriage of justice." *Nevarez-Diaz v. United States*, 870 F.2d 417, 422 n.1 (7th Cir. 1989). The constitutional protection at issue here is the true voluntariness of the plea. *See, e.g., Haase v. United States*, 800 F.2d 123, 127 (7th Cir. 1986). "Thus, a guilty plea is constitutionally infirm, as opposed to only violative of Rule 11, when the plea is not knowing and intelligent." *Id.* It is the constitutionality of the plea, not the technical requirements of Rule 11, that forms the basis of our analysis.

Marx must show that the taking of the plea by the trial judge did not meet constitutional muster, and under these

circumstances, we are not bound to look solely at the transcript of the plea hearing in making this constitutional determination. "In analyzing the 'voluntariness' of guilty pleas courts have looked beyond the transcript of the plea hearing to all the surrounding facts and circumstances." *Id.*

There is no claim that Marx did not have the mental capacity to comprehend the proceedings of the plea hearing. He is a high-school graduate and has taken a two-year course in college-level engineering. He was also a successful businessman, having started and operated a foundry for twenty years. But the district court still must proceed with caution, because "the ability to comprehend is meaningless if through the failure of court and counsel you do not receive the information necessary to understanding." *Id.* If Marx, however, was adequately

informed of the nature of the charges, then he cannot prevail.

The background of this case discloses that Marx had thirteen months prior to the entry of his plea to become acquainted with the charges against him. Marx was indicted on August 7, 1985. He was arraigned the next day. The plea agreement was filed with the court on September 8, 1986. During the intervening year, Marx himself or his attorney filed dozens of documents relating to the various twenty-six counts against Marx, including the three counts to which Marx eventually pleaded guilty. These included a motion with attached memorandum for the dismissal of the continuing criminal enterprise count, a motion with attached memorandum for the dismissal of various counts including the false tax return count, a motion to dismiss or in the

alternative to elect between the continuing criminal enterprise count and a conspiracy to distribute count with attached memorandum, and a motion for the severance of several counts, including the unregistered firearm count and the continuing criminal enterprise count. There were a number of motions directed to the counts which Marx now alleges he does not understand.

At the crucial time of the plea hearing Marx was placed under oath. The district judge then engaged Marx in a discussion regarding the entry of his plea. Marx told the court that he had reviewed the plea agreement and that he understood that he was pleading guilty to the three stated counts. The court determined that Marx understood that the counts concerned engaging in a continuing criminal enterprise involving drugs, possessing an unregistered firearm, and

filing a false income tax return. The judge then told Marx that after the Assistant U.S. Attorney outlined the elements of the counts charged, the judge would ask Marx to confirm that he understood the elements of the three offenses. The Assistant U.S. Attorney then began to describe the elements of each count to which Marx was pleading guilty.

As to the false tax return count, the government recounted as an element of proof in an oral presentation that Marx willfully made a false return to IRS. Marx later responded affirmatively when asked by the judge whether he understood that that element among others was present in his situation.

As to the unregistered firearm count, the government listed as elements of proof in an oral presentation that Marx possessed a firearm known as an AR-

15 automatic rifle, and that the weapon was not registered. The government also noted that the evidence would show that Marx knew registration was required. Marx later responded affirmatively when asked whether he was satisfied the government was in a position to prove all of those elements.

As to the continuing criminal enterprise count, the judge provided Marx with a copy of the plea agreement, directed Marx's attention to the six-page section of the agreement setting forth in detail the "elements of offenses to which defendant will plea guilty," and asked Marx to follow along.

Next the government indicated that it was prepared to recite a fifty-five page "Offer of Proof" which would set forth the factual basis for the plea. Marx's attorney told the court that he had reviewed the "Offer of Proof" with

Marx and it was not necessary or appropriate to go through it on the record. Defense counsel also indicated that, in general, Marx was in agreement with the document. He added that any disagreement Marx had with the "Offer of Proof" was not material to the government's ability to prove the elements of the offenses. The court then took a recess during which the judge directed Marx to review a copy of the "Offer of Proof." The judge also reviewed the proffered evidentiary statement during the recess. When the hearing resumed, the judge asked Marx whether "in the overall, basic ... picture ... [the "Offer of Proof" is] something that you substantially understood would be the government's proof." Marx answered affirmatively. The court then found that there was a factual basis for the plea.

It is appropriate to note that there

is a presumption of truthfulness for responses given under oath by a defendant during a plea hearing. *United States v. Ellison*, 835 F.2d 687, 693 (7th Cir. 1987). As we indicated earlier Marx was under oath when he made the foregoing responses to the inquiries of the district judge.

Marx now argues that he did not understand the willfulness element of filing a false tax return. This argument is untenable. The Assistant U.S. Attorney, when reviewing the elements of the charge of filing a false income tax return at the plea hearing, specifically noted the elements' location in the plea agreement and then went through each element orally. This included the requirement that the defendant, in making and subscribing to the return, do so willfully. Plea Tr. at 13. Marx later responded that he was satisfied that the

elements listed by the government were present in his situation. Plea Tr. at 17.

With respect to the unregistered firearm count, although Marx held a federal firearms dealer's license, Marx now denies he knew that the firearm was fully automatic and required registration. The government stated in its recitation of the elements that:

> although the government is not required to prove that the defendant knew that the weapon in his possession was a firearm within the meaning of the statute [the evidence would show] that the defendant knew that registration was required. The evidence would have proven that he was knowledgable [about] these elements.

Plea Tr. at 14. Marx then admitted that the government was in a position to prove the required elements - including the registration requirement. Plea Tr. at 18. Marx fully understood the nature of this charge.

With respect to the continuing criminal enterprise count, Marx now alleges that he did not understand the requirement that he must have supervised, managed, or organized five or more persons. Although this was one of the two elements the government initially passed over at the plea hearing when reciting the elements, the Assistant U.S. Attorney later went back and described this element by name and pointed out to Marx and the court the exact pages on which the final three elements of the continuing criminal enterprise count were found in the plea agreement. The Assistant U.S. Attorney referred to the element as "in concert with five people." This was in reference to the requirement of 21 U.S.C. § 848(c)(2)(A):

> which are undertaken by such person in concert with five or more other persons with respect to whom such person occupies a position of organ-

> izer, a supervisory position, or any other position of management....

The Assistant U.S. Attorney pointed to the specific page on which the element above was found and defined. Plea Tr. at 18-19. The district judge likewise pointed to the particular page on which that element was set forth, and directed Marx's attention specifically to the element he now alleges he did not understand. Plea Tr. at 19. Marx acknowledged he was familiar with the elements, and that he felt he understood the language included on those pages, which described and defined the elements. Marx also acknowledged that those were the elements that he had discussed with his counsel. Under these factual circumstances, we conclude that Marx was fully aware of the elements of this charge as well.

The district court's other questions

to Marx and the surrounding circumstances and background are also important in determining whether Marx understood the nature of all the charges. Marx acknowledged he had reviewed the "Offer of Proof," and agreed in general with the factual basis it set forth. Marx acknowledged by signing the plea agreement that:

> he has read and fully understands the charges in the Indictments in each of the cases pending against him, and that he fully understands the nature and elements of the crimes with which he has been charged and that those charges have been fully explained to him by his attorney.

He admitted to the judge that he was in fact guilty when queried about each of the three crimes. "Although the Constitution makes knowledge a condition of a valid plea, it does not prescribe any formula for the creation of that knowledge." *Wildes*, 910 F.2d at 1486. A thorough examination of the plea hearing

and all the surrounding facts and circumstances demonstrates that Marx's guilty plea met constitutional requirements that it be voluntary, knowing and intelligent. Marx has failed to carry his burden of persuasion to the contrary. The district court did not err in finding that Marx's plea had been made in compliance with the Constitution.

III.

The district court acted correctly in refusing to vacate the guilty plea of Dennis Purtell Marx and the decision of the district court is hereby AFFIRMED.

APPENDIX

Relevant portions of the plea agreement provide the following.

VII. DISPOSITION OF THE FORFEITED AND NON-FORFEITED PROPERTY AND ASSETS

A. [If Marx's guilty plea is accepted by the court it is agreed] the court shall then enter a forfeiture order pursuant to 21 U.S.C. § 853(a) and in accordance with the forfeitures in 21 U.S.C. § 853(a), to provide that all right, title, and interest is vested in the United States of America with regard to all of the property and assets described in ... Attachment C of this Plea Agreement ... except to the extent that such properties and assets are necessary sources of funds needed:

1. To satisfy any and all taxes, penalties, interest and other charges that have been assessed by the Internal Revenue Service....

B. It is further agreed and understood by the parties to this agreement that in accordance with the terms of this agreement the court shall order the disposal

by the United States Marshal Service and under the auspices of the court, *all* of the assets and properties described in Attachment C of this agreement by sale or any other commercially feasible means, and shall further order that the proceeds derived from the sale or other commercially feasible disposal of the assets and properties ... be distributed in accordance with the order and sequence of distribution set forth below in section VIII of this agreement, making due provisions to protect the interest of the United States and third parties.

VIII. DISPOSITION OF THE PROCEEDS FROM THE DISPOSAL OF THE FORFEITED AND NON-FORFEITED ASSETS AND PROPERTIES

A. It is further understood and agreed by the parties to this agreement that ... following the sale or other commercially

feasible disposition of the assets and properties described in Attachment C of this agreement and under the auspices of the court in accordance with paragraphs A and B contained in Section VII of this agreement, the court shall order that the proceeds from the disposal of the assets and properties be distributed by the United States Marshal Service and pursuant to court order, in the following order of priority:

...

2. *Assets and Properties Associated with Maple Tree Farms*

(a) First, payment of any and all expenses incurred by the United States Marshal Service in conjunction with the seizure, maintenance, security and sale of the properties and assets described in Attachment C, and the repayment to the National Asset Forfeiture Fund of any

advances made to the property and assets by the United States Marshal Service.

(b) Second, after proceedings are held in accordance with the provisions in 21 U.S.C. § 853(n), payment of any and all bona fide liabilities and/or obligations of Maple Tree Farms together with any other encumberance(s) [sic], unless, pursuant to the terms of any sale or purchase agreement, such liability, obligation, and/or encumberance [sic] is assumed by the purchaser of such property or asset.

(c) Third, payment of the remaining balance shall be made to the United States Department of Justice's Asset Forfeiture Fund pursuant to 21 U.S.C. § 524(c).

B. It is further agreed and understood by the parties to this agreement that upon the imposition of sentence on the defendant ... the United States Marshal

shall deliver to either Kathy Marx, Susan Marx or Lynn Brogge (whichever of the three they collectively/jointly or otherwise designate to be the recipient), twenty-one head of cattle, as more fully described in Attachment F of this Plea Agreement, from the Maple Tree Farm herd.

(ATTACHMENT C)

...

(c) any and all livestock including, but not limited to all black angus bulls, cows and calves titled to or otherwise owned by Dennis P. Marx and/or Maple Tree Farms; ...

(ATTACHMENT F)

CATTLE BY I.D. NUMBER

The livestock to be released to either Kathy Marx, Susan Marx or Lynn Brogge, in accordance with paragraph 21 [sic] of the Plea Agreement are as follows:

Tag # 1

8

14D with calf 211

16C

43

75

132

75-1

1312 and new calf

403

16C-2

R21

R29

R33

604

63

66

R46

R40

Additionally, the United States Marshal shall return to the above-referenced individuals two donkeys.

CUDAHY, *Circuit Judge*, dissenting.

I believe that the innovative but ultimately, deficient procedure used to accept Marx's guilty plea here fails to meet constitutional standards. In addition, the government fell significantly short in carrying out its commitments under the plea agreement with respect to the return of the cows. I therefore respectfully dissent.

I.

It is a crucial constitutional requirement that, for a waiver of right to trial to be valid, a defendant's plea must be knowing and voluntary. *Haase v. United States*, 800 F.2d 123, 127 (7th Cir. 1986). The majority correctly points out that the district judge here did not follow the prescriptions of Rule 11 in taking the plea. it is also true that fidelity to Rule 11 is not the issue

on a collateral attack, such as this one. Nonetheless, because the change of plea proceeding did not include a recitation of the elements of the crime and because the offer of proof terminated very prematurely, I would vacate the plea and permit Marx to plead anew.

We have always treated procedures for acceptance of pleas as absolutely vital to ensuring that the plea is voluntary, knowing and intelligent. The standard we employ does not turn merely on the probability that Marx understood his plea. Rather, the record must support a reasonable belief that Marx knew the contours of the law and understood the relationship between his actions and the legal standards. *United States v. Frye*, 738 F.2d 196, 199 (7th Cir. 1984)(defendant "must understand not only the nature of the charge against him or

her, but also that his or her conduct actually falls within the charge"); *Nevarez-Diaz v. United States*, 870 F.2d 417, 420-21 (7th Cir. 1989).

The record certainly does not support the conclusion that Marx had an understanding of the CCE offense. The majority's reliance on inferences from certain surrounding circumstances - Marx's education, the familiarity with the offense Marx arguably gained during the pre-trial period and the motions directed to the counts which Marx now alleges that he does not understand - involves only the most indirect clues that Marx had an understanding of either the elements of the CCE offense or of the offenses in his background that support the CCE conviction. The majority also points out that the Assistant U.S. Attorney and the judge actually recited the elements of the offense, albeit in a

distressingly interrupted and halting manner. The entire extent of this recitation, while Marx held a copy of the plea proceedings in his hands, is as follows:

> Q[Judge]: As to count twenty-four, commencing at the bottom of page eight and running over to the top of page nine, are you satisfied that those are the elements that you and your attorney discussed in connection with the proof that would be required of the government in this case before you could be found guilty?
>
> A [Marx]: Yes, I am, your Honor.
>
> Mr. Wagner [Assistant U.S. Attorney]: Your Honor, in connection with the second, just so the record is complete, the elements of count twenty-four, the CCE offense, really the first element is contained at the bottom of page eight, which is, there is at least three violations. That is then explained over paragraph nine, and paragraph ten.
>
> Mr. Glynn [Marx's Attorney]: Page nine and ten.
>
> Mr. Wagner: Page nine and ten. And on page eleven are the final three elements of the CCE offense, that is paragraphs B, C, and D, violations were continuing series of viola-

> tions, they were in concert with five people and substantial resources. Just for the sake of the record.

Change of Plea Tr. at 18-19.

As a recitation of the elements of the offense these quoted comments are strikingly deficient. In addition, the Assistant U.S. Attorney, in his earlier description of the offense, verbally outlined only a general description of the CCE charge. Tr. at 15-16. And as the quoted excerpt shows, the court did not provide an adequate, on-the-record recitation of the elements of the crime.

The Supreme Court has stated that a court may not, merely through the defendant's representations about his offense, conclude that he understand the nature of the offense. *Blackledge v. Allison*, 431 U.S. 63, 75 (1977). That the defendant has read the plea agreement or has signed a statement of the facts is not enough to

show that the plea is voluntary. *United States v. Bernal*, 861 F.2d 434, 436-37 (5th Cir. 1988), *cert. denied*, 110 S.Ct. 203 (1989). The demonstration of knowledge and of voluntariness must be on the record and it must be clear. A defendant's discussion with his attorney, which the court in part relied upon here, is generally insufficient. *United States v. Ray*, 828 F.2d 399, 406, 410 (7th Cir. 1987), *cert. denied*, 485 U.S. 964 (1988).

The complexity of the offense is also an important determinant of the thoroughness demanded of the judge; a guilty plea to CCE - a highly complex criminal statute - certainly requires more than reference to a written summary. Nowhere in the transcript is there a clear and thorough description of the CCE elements. Perhaps the description in the copy of the plea agreement that Marx had before him was accurate. Perhaps he un-

derstood the elements correctly. Perhaps Marx's attorney explained the elements adequately. But the court's obligation is to ensure that any uncertainties are eliminated - on the record.

In addition, the district court's method of accepting the government's offer of proof fails, in my mind, to meet constitutional standards. The proof was likely to be long - fifty-some pages - and so the judge accepted the suggestion of Marx's attorney that the formal representation of the proof be eliminated because Marx and his attorney largely agreed with its contents. The judge then asked Marx whether he understood the contents of the offer, and Marx responded that he did. This procedure does not ensure that Marx in fact understood the offer, and Rule 11, though not directly applicable here, rejects this approach.

Marx acknowledged that he had listened to his lawyer and read the offer of proof. But there is not indication that the *judge* satisfied himself that Marx understood fully the contents of the offer.

The majority holds the failure of the court to follow traditional plea-taking procedures harmless because Marx purportedly understood the charges against him. The "totality of the circumstances" test is flexible, and when employed, a strong presumption must still be given to what is in the record. Here, in my mind, neither the transcript alone nor the totality of the circumstances adequately supports a finding of voluntariness. Consistent with *McCarthy v.*

United States, 394 U.S. 459, 472 (1969),[1] Marx should have the opportunity to plead anew.

II.

Nor is the return of the cows a simply trivial matter. From the briefs and the district court's ruling, it appears that twenty-one cows were in issue. The majority now deduces from circumstantial evidence in the record that only two cows are actually at stake. The picture constructed by the majority has required a fair amount of detective work that I think inappropriate when the government

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[1] *McCarthy* involved application of Rule 11, and the addition of Rule 11(h) in 1983 narrowed the holding's scope. Rule 11(h) states "[a]ny variance form the procedures required by this rule which does not affect substantial rights shall be disregarded." Because Marx's rights to trial and to understand completely the charges to which he pleaded are substantial, his situation is not susceptible of "harmless error" analysis.

makes no such claims for itself. The district court, ruling on Marx's section 2255 motion to vacate sentence, does not mention the number of cattle. Decision and order (Jan. 20, 1989), at 2-7 (Appellant's App. at 29-34). Nonetheless, even if only two cows are at stake, I would vacate this plea because of the government's inexplicable failure to abide by the terms of the agreement.

The consideration surrendered by a defendant in entertaining a plea agreement is no less than his right to a trial and, often, his freedom. Plea agreements must be interpreted strictly. with respect to the transfer of the cows, the district court held that "upon" meant, "sometime after." The majority, not dealing with this point, instead concludes that the government's delay in returning the two (twenty-one?) cows was justified because the government first

had to resolve conflicting lienholders' claims to the cattle under Section VII of the agreement. this procedure, the majority claims, is compelled because the twenty-one head of cattle are mentioned not only in Section VIII(B)'s promise from the government to return the cattle but are also listed in Attachment C's schedule of assets to be forfeited.

Section VII appears to govern disposition of the property listed in Section VIII. But this procedure cannot possibly include all of Section VIII. It is true that Section VII clearly governs the property list in Section VIII(A), which references Schedule C's list of cattle. However, Section VII(B) provides:

> It is further agreed and understood by the parties to this agreement that in accordance with the terms of this agreement the court shall order the disposal by the United States Marshal Service and under the auspices of the court, *all* of the assets and properties des-

> cribed in Attachment C of this agreement by sale or any other commercially feasible means, and shall further order that the proceeds derived from the sale or other commercially feasible disposal of the assets and properties described in Attachment C of this agreement be distributed in accordance with the order and sequence of distribution set forth below in section VIII of this agreement, making due provisions to protect the interest of the United States and third parties.

Plea Agreement at 19-20 (emphasis in original). Yet Section VIII(B) clearly commands return of the cows and not cash from their sale. I therefore conclude that Section VIII(B) must be read independently of the lien-clearing provisions of Section VII. These cows were to be returned upon sentencing (immediately or, at least, promptly) - not after determining how to protect lienholders under 21 U.S.C. § 853(a), as incorporated in Section VII. This rests on Section VII(B)'s mention of Attachment C, which includes livestock from Maple Tree Farms.

Yet when Attachment C assets are again mentioned in Section VIII(A), the majority prefers not to make the cows eligible for the lien-clearing procedure. A more consistent interpretation is that Section VIII(B)'s reference to the cows - in Attachment F - is distinct from both the hindrance of Section VII's delay and the lien clearance provision of Section VIII(A).

The defendant has shown why the prompt return of the cows was of moment to him and to his daughters. It was treated as a substantial term of the plea bargain. It should certainly not be our job to speculate and search the record for excuses for the government's non-compliance with the agreement.